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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MANUEL E. MORENO, Defendant and Appellant.	A122659 (San Mateo County Super. Ct. No. SC065360)

Appellant Manuel E. Moreno was convicted of two counts of attempted murder and related charges arising out of an incident in which he shot at two members of a rival gang. On appeal, he contends the jury was improperly instructed that the "People," rather than the state or the prosecutor, have the burden to prove guilt beyond a reasonable doubt. He also argues that his convictions for attempted murder and assault against one of the two rival gang members must be reversed due to instructional error and insufficient evidence that he intended to murder that person. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was a member of the Norteño street gang. On May 6, 2007, he was in a car with two younger Norteño gang members, Fernando Valencia and Jorge Lopez. Lopez was driving. As they were driving through East Palo Alto, they saw two young men, Edgar Cibrian and Martin Patiño, walking on the sidewalk. Cibrian and Patiño are both members of the Sureño street gang. Valencia recognized Patiño, whom he knew was a Sureño. Lopez recognized both Cibrian and Patiño and knew they were Sureños. Cibrian was wearing clothing colored blue—a color "claimed" by the Sureños.

As they drove past Cibrian and Patiño, appellant and the other two Norteños in the car "stared" at them. Cibrian and Patiño stared back at the Norteños in the car. Among gang members in the East Palo Alto area, staring at opposing gang members, also known as "mugging," is considered to be a challenge to a fight. Cibrian also "flashed" his Sureño-colored blue belt.

Appellant told Lopez to stop the car. Valencia assumed there would be trouble because Patiño was a Sureño and appellant had spoken about fighting Sureños. Lopez turned the corner, pulled to the curb, and stopped the car. Appellant got out of the car. According to Lopez, appellant got out of the car because there were two Sureños and appellant did not like Sureños.

Anticipating a fight, Cibrian and Patiño stepped into the street and approached the car. Appellant called out, "Hey, blood," pulled out a handgun, raised it to waist level, and began shooting in the direction of Cibrian and Patiño, who were standing near each other, about 12 inches apart. Appellant was on the other side of the street, approximately 16 feet away. Appellant shot Cibrian in the leg. When they saw the gun, Cibrian and Patiño turned and ran. They stayed close to one another, although Cibrian ran in a straight line and Patiño ran in a zig-zag pattern. While running away, Cibrian was hit in the back with two more shots.

Three empty shell casings were found at the scene when police investigated shortly thereafter. According to an expert witness who testified at trial, the shooting was consistent with a gang member's actions in attacking a rival gang on behalf of his gang and in "schooling" younger members of his own gang. The expert witness also testified the shooting had taken place in Sureño territory.

In an information filed January 16, 2008, the San Mateo District Attorney charged appellant with two counts of attempted murder, with the use of a firearm, for the benefit of a street gang. (Pen. Code,[1] §§ 187, 189, 664, 12022.53, subd. (d), and 1203.6, subd. (a).) Count 1 was alleged as to Cibrian, and count 2 was alleged as to Patiño. In count 1,

[1] All further statutory references are to the Penal Code unless otherwise specified.

the district attorney alleged that appellant intentionally inflicted great bodily injury upon the victim. (§§ 1203, subd. (e)(3), 12022.7, subd. (a), and 1203.075, subd. (a)(1).)

The information also charged appellant with two counts of assault with a deadly weapon (§ 245, subd. (b)), with count 3 alleged as to Cibrian and count 4 alleged as to Patiño. Appellant was also charged with one count of participating in a criminal street gang (§ 186.22, subd. (a)) and one count of possessing counterfeit currency (§ 476). It was further alleged that appellant had suffered prior convictions within the meaning of sections 1203.08, 1203, subdivision (e)(2), 1203, subdivision (e)(4), 1170.12, subdivision (c)(1), 667, subdivision (a), and 667.5, subdivision (b). Appellant was also alleged to have committed the charged offenses while on parole.

At trial, the court dismissed the counterfeit currency charge and the "on parole" enhancement allegation on the prosecutor's motion. A jury convicted appellant of all the remaining charges and enhancements related to the offenses. In a bifurcated proceeding, the court found the prior offense allegations to be true. The court sentenced appellant to serve 110 years to life in state prison.

DISCUSSION

I. REFERENCE TO THE PROSECUTION AS "THE PEOPLE" IN CALCRIM NO. 220

The trial court instructed the jury with CALCRIM No. 220, which provides as follows: "A defendant in a criminal case is presumed to be innocent. The presumption requires that *the People* prove a defendant guilty beyond a reasonable doubt." (Italics added.) The court had previously instructed, "When I refer to 'the People,' I mean the attorney for the District Attorney's Office who is trying this case on behalf of the People of the State of California." Appellant now argues that CALCRIM No. 220 incorrectly substitutes "the People" for "the State," thereby violating his due process rights and his right to a fair jury trial.

Appellant's primary claim is that the language of CALCRIM No. 220 is inconsistent with the language of section 1096, which provides that "the state" has the

burden of proving a defendant's guilt beyond a reasonable doubt.[2] Section 1096a, in turn, provides that, "In charging a jury, the court *may* read to the jury Section 1096, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given." (Italics added.) Appellant asserts that referring to the prosecution as "the People" tends to reinforce a sense of identification between the prosecution and jurors—who might think of themselves as "the People."

Appellant's contention that it is unconstitutional and violative of due process to refer to the prosecution as "the People" has been rejected by every California court that has considered the issue. In *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1068, our Supreme Court held that "[t]o refer to the complaining party as "The People" does not violate due process or other constitutional principles. [Citation.]" (Accord *People v. Black* (2003) 114 Cal.App.4th 830, 832-834; *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1181-1182.) In *People v. Whisenhunt* (2008) 44 Cal.4th 174, 223, the Supreme Court again addressed a contention that referring to the prosecution as "the People" violates a defendant's "right to due process and other constitutional rights," stating succinctly that "[w]e have previously rejected such claims and do so again here. [Citations.]"

Appellant attempts to distinguish these authorities, claiming they do not address his argument that the language of CALCRIM No. 220 conflicts with the wording of section 1096. He also argues the existing body of case law primarily addresses whether it is appropriate for the prosecution to refer to itself as "the People" in the *caption* of a criminal case, which he claims is quite different from referring to the party with the burden of proof as "the People" in jury instructions. Appellant is mistaken. In *People v. Whisenhunt, supra,* one of the defendant's claims was that it was inappropriate to refer to

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[2] Section 1096 provides in part as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to an acquittal, but the effect of this presumption is only to place upon *the state* the burden of proving him or her guilty beyond a reasonable doubt." (Italics added.)

the prosecution as "the People" in jury instructions, including the instruction defining reasonable doubt.[3] The Supreme Court rejected the argument without elaboration. (*People v. Whisenhunt, supra,* 44 Cal.4th at p. 223.)

More recently, in *People v. Romero-Arellano* (2009) 171 Cal.App.4th 58 (*Romero-Arellano*), Division Two of this court rejected the very arguments appellant advances here. Indeed, judging by the description of the defendant's contentions in *Romero-Arellano,* they appear to be nearly a carbon copy of appellant's contentions here, using the same "vigorous, and at times colorful, argument." (*Id.* at p. 63.) The court in *Romero-Arellano* concluded that jury instructions referring to the prosecution as "the People" were proper, rejecting each of the defendant's challenges to the instructions. (*Id.* at pp. 65-70.)

We decline to part from the unbroken line of cases establishing that it is proper to refer to the prosecution as "the People." Indeed, given that we are bound to follow our Supreme Court's decisions on the issue (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), we have no choice but to reject appellant's contentions otherwise.

II. SUFFICIENCY OF THE EVIDENCE

Although appellant concedes there was sufficient evidence presented at trial to establish that he attempted to murder Cibrian, he argues there was no evidence that he attempted to murder or assault Patiño. According to appellant, it was Cibrian who "mugged" the Norteños, who "flashed" his blue belt, and who was wearing clothing in Sureño colors. Further, he points out that all three bullets struck Cibrian; none struck Patiño. Thus, he asserts there was nothing to support a claim he intended to murder Patiño. We disagree.

In reviewing whether the evidence is sufficient to support a conviction, our role is limited. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We examine the record in the light most favorable to the judgment below to determine whether it discloses substantial

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[3] On the court's own motion, we take judicial notice of argument XXI contained in defendant's opening brief on the merits in *People v. Whisenhunt,* Supreme Court case number S056997. (Evid. Code, §§ 452, subd. (d)(1), 459.)

evidence such that any rational trier of fact could find essential elements of the crime true beyond a reasonable doubt. (*People v. Marshall* (1997) 15 Cal.4th 1, 34.) Substantial evidence is evidence that is reasonable, credible, and of solid value. (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) Although "mere speculation cannot support a conviction" (*People v. Marshall, supra,* 15 Cal.4th at p. 35), the trier of fact is entitled to draw reasonable inferences from the evidence and the court will presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Rayford* (1994) 9 Cal.4th 1, 23, disapproved on another ground in *People v. Acosta* (2002) 29 Cal.4th 105, 120, fn. 7..)

The evidence at trial supports a reasonable inference that appellant intended to kill Patiño as well as Cibrian. There is no evidence to suggest appellant knew Cibrian or had any particular reason to kill him, aside from the fact Cibrian was a Sureño. If appellant's intent was to shoot Sureños—as the prosecution's gang expert opined—then it is reasonable to infer that appellant intended to kill both Cibrian and Patiño, since the evidence supports an inference that appellant knew or had reason to believe they were both Sureños. Among other things, both of appellant's companions recognized Patiño and knew he was a Sureño gang member. Patiño was walking with somebody who was "flashing" Sureño colors, and both he and Cibrian were in Sureño territory. Patiño, like Cibrian, had even stared back at the Norteño gang members, or "mugged" them, in what is commonly understood to be a challenge to a fight. Thus, it is reasonable to believe the same animus that induced appellant to attempt to kill Cibrian would have motivated him to kill Patiño as well. As the prosecution's gang expert opined, it would be entirely consistent with the typical sort of Norteño shootings in or around East Palo Alto for a Norteño gang member to eliminate as many rival gang members as he could—"two less Sureños would be a great benefit to the Norteño gang, there's two people they would not have to deal with."

Cibrian's testimony as well as that of appellant's companions, Valencia and Lopez, likewise supports a conclusion that appellant did not differentiate between Cibrian and Patiño. For example, Cibrian testified on two different occasions that appellant was

shooting "at us," referring to both him and Patiño. When Valencia described appellant's actions after he got out of the car, he described appellant as approaching "them" and not just one individual. Further, when a police officer asked Lopez what motivated appellant, he responded, "Because he doesn't like *them*." (Italics added.)

Appellant relies heavily on the fact that all three bullets struck Cibrian, arguing that this evidence supports an inference he intended to kill only Cibrian. While it is true the evidence supports the inference appellant advocates, it is not the only reasonable inference that can be drawn from the evidence when considered as a whole. After Cibrian was struck with the first bullet, he made himself an easier target by running away from appellant in a straight line. By contrast, Patiño ran away from appellant in a zig-zag pattern to avoid being shot. It is therefore not surprising that Cibrian was shot multiple times but Patiño escaped injury. In short, the fact that Cibrian was struck by all three bullets suspected to have been fired does not compel the conclusion that appellant necessarily intended to kill only Cibrian. Rather, the evidence as a whole permits an inference that appellant was shooting at both Cibrian and Patiño.

Furthermore, even if appellant primarily sought to kill Cibrian, he would nonetheless be guilty of the attempted murder of Patiño as a result of the indiscriminate manner in which he shot at Cibrian. A jury may infer that a defendant who sought to kill a particular target also intended to kill other persons within a "kill zone" around the intended target. (*People v. Bland* (2002) 28 Cal.4th 313, 329-330.) Here, one could reasonably conclude Patiño was within the "kill zone." He was standing next to Cibrian when appellant began firing. Appellant fired a handgun from the waist from 16 feet away, and he continued firing as Cibrian and Patiño ran away. Given the distance of the targets from appellant, the proximity of the targets to each other, and the manner in which appellant "shot from the hip," a reasonable jury could find that appellant was shooting indiscriminately at Cibrian and sought to kill both Cibrian and Patiño, even if Cibrian was his primary target. We therefore reject appellant's challenge to the sufficiency of the evidence.

III. INSTRUCTIONAL ERROR

Appellant contends the jury instructions improperly permitted the jury to use his intent to kill Cibrian as the basis for finding him guilty of the attempted murder of Patiño. He makes a similar claim with respect to the assault charge.

The court instructed the jury as follows on the elements required for attempted murder: "The defendant is charged in Count 1 and 2 with Attempted Murder. To prove that the defendant is guilty of attempted murder, the People must prove that: 1. The defendant took at least one direct but ineffective step toward killing another person; and 2. The defendant intended to kill that person." Appellant contends the instruction failed to inform the jury that it must find—in *each count*—that he intended to murder the alleged victim in order to find him guilty of that count. Appellant challenges the assault instruction on the same grounds, contending that the lack of specificity in the instruction allowed the jury to use appellant's intent to assault Cibrian as the basis for finding him guilty of assaulting Patiño.

Appellant's claims are meritless. The court instructed the jury it had to find appellant took a direct but ineffective step toward killing "another person" and that appellant sought to kill "that person." The phrase "that person" plainly refers back to "another person," such that the jury would understand it had to find evidence of intent to kill *as to each victim in each particular charge*. In the context of the overall charge to the jury, it is not reasonably likely the jury transferred the intent to kill or assault from Cibrian to Patiño when it was expressly instructed that appellant must have intended to kill or assault "that person."

Appellant also contends the trial court was required to give a unanimity instruction because, according to appellant, "each shot could only have one intended victim" and the prosecutor should have been required to indicate which shots were intended for Patiño. We disagree.

The California Constitution protects the right of every criminal defendant to a unanimous jury verdict. (Cal. Const., art. I, § 16; *People v. Jones* (1990) 51 Cal.3d 294, 321.) A defendant's constitutional right to a unanimous jury verdict requires that when

the evidence shows more than one unlawful act that could support a single charged offense, the prosecution must either elect which act to rely upon, or the court must sua sponte give a unanimity instruction telling the jury they must unanimously agree which act constituted the crime. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534, 1539; *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) The instruction is designed to eliminate the possibility that a defendant will be convicted when there is no single offense that all the jurors agree the defendant committed.

A unanimity instruction is not required in all cases even where the evidence establishes that more than one act could suffice for a conviction of a particular offense. " ' "A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged." [Citations.] "[W]here the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury's understanding of the case." ' [Citations.]" (*People v. Champion* (1995) 9 Cal.4th 879, 932, overruled on another ground in *People v. Combs* (2004) 34 Cal.4th 821, 860.)

Here, the court had no sua sponte duty to instruct the jury on unanimity. Appellant is mistaken when he argues that "each shot fired could only have one intended victim." According to the Supreme Court, "a person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind. An indiscriminate would-be killer is just as culpable as one who targets a specific person." (*People v. Stone* (2009) 46 Cal.4th 131, 140.) As previously discussed, the evidence in this case showed that appellant was shooting indiscriminately at both Patiño and Cibrian. There was no need for the prosecutor to demonstrate which bullet was intended for which victim. Even if appellant intended only to hit Cibrian, as he now claims, he created a "kill zone" in which both victims were equally in danger. (*People v. Bland, supra,* 28 Cal.4th at pp. 329-331.) Moreover, in closing argument the prosecutor did not present a theory suggesting that a single conviction could be supported by any of a number of different

acts. Instead, the prosecutor took the position that each bullet was intended for *either* victim. Under the circumstances, no unanimity instruction was required.

DISPOSITION

The judgment is affirmed.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Siggins, J.